

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0093



In re:

VANISHING SPECIES WILDLIFE INC.,
A Florida corporation,

Respondent.

Appearances:

Colleen Carroll, Esq., for Complainant

Barbara Hartmann for Respondent

Before:

Janice K. Bullard, Administrative Law Judge

DECISION AND ORDER

I. INTRODUCTION

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("the Rules"), set forth at 7 C.F.R. subpart H, apply to the adjudication of the instant matter. The case involves a complaint filed by the United States Department of Agriculture's Administrator of the Animal and Plant Health Inspection Service ("USDA"; "APHIS"; "Respondent") against Vanishing Species Wildlife Inc. ("Respondent"), alleging violations of the Animal Welfare Act, 7 U.S.C. §§2131 et seq. ("AWA" or "the Act"). The AWA vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act.

Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of

the USDA. 7 U.S.C. §2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7. U.S.C. §2151. The Act and regulations fall within the enforcement authority of APHIS, an agency of USDA.

This matter is ripe for adjudication, and this Decision and Order¹ is based upon the documentary evidence and arguments of the parties.

II. ISSUE

The primary issue in controversy is whether Respondent violated the AWA and if so, what, if any, sanctions may be imposed.

III. PROCEDURAL HISTORY

On December 2, 2011, USDA filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) (“Hearing Clerk”). On December 28, 2011, Respondent filed an answer. Complainant sent Respondent evidence and filed witness and exhibit lists in compliance with my Order of March 9, 2012.

By Order issued on July 9, 2012, I directed Respondent to show cause in writing why a Decision and Order on the record should not be entered. On July 26, 2012, Complainant moved for summary judgment. Respondent did not directly fulfill the instructions of my Order, but on August 21, 2012, filed correspondence disputing the allegations of the complaint and requesting its dismissal. By Order issued August 27, 2012, I deferred ruling on Complainant’s motion, and directed Respondent to exchange evidence, and further directed the parties to consult about a hearing date. I granted Respondent’s September 20, 2012, motion for an extension by Order issued September 27, 2012. On October 9, 2013, Respondent filed a witness list with the Hearing Clerk, along with a copy of a lease, hereby identified as RX-1.

¹ In this Decision and Order, documents submitted by Petitioner shall be denoted as “PX-#” and documents submitted by Respondent shall be denoted as “RX-#”.

I held a telephone conference with the parties on January 22, 2013, in which Respondent expressed the desire for a Decision on the Record. I set deadlines for submissions, memorialized in an Order issued January 24, 2013. I set aside the dates of May 8, 2013 and May 9, 2013 for a hearing, in the event that a Decision on the Record was inappropriate. Neither party filed supplemental evidence, and I canceled the hearing dates. By Order issued May 31, 2013, I directed Complainant to file a status report, which was filed on June 28, 2013.

Respondent had been the subject of other complaints and actions initiated by Complainant. An earlier filed complaint was resolved by the entry of a consent decision between USDA and Respondent on February 4, 2009. On March 30, 2010, APHIS issued a notice to Respondent to show cause why Respondent's AWA license should not be terminated for the failure to comply with the terms of the consent decision it had entered into². On August 5, 2010, Chief Administrative Law Judge Peter M. Davenport issued summary judgment in favor of USDA, on the grounds that Respondent admitted that it had failed to comply with the consent decision. Judge Davenport further concluded that Respondent was disqualified from being licensed under the Act for a period of two (2) years. Respondent appealed that determination to the Judicial Officer for USDA, who affirmed Judge Davenport's grant of summary judgment by Decision and Order issued November 3, 2010. CX-20.

All documents attached to Complainant's motion, identified as CX-1 to CX-22, and Respondent's submissions are hereby admitted to the record.

IV. LEGAL STANDARDS

1. Waiver of Hearing

² I take official notice of the pleadings filed in conjunction with In re: Vanishing Species Wildlife, Inc., and Barbara Hartmann-Harrod and Jeffrey Harrod, AWA Docket No. 10-0194.

The Rules provide that the “[f]ailure to request a hearing within the time allowed for the filing of an answer shall constitute a waiver of such hearing.” 7 C.F.R. § 1.141(a). Respondent did not request a hearing (see, Answer filed on December 28, 2011). Moreover, in a telephone conference with me on January 22, 2013, supported by written submissions filed on August 21, 2012, Respondent’s representative Barbara Hartmann, advised me that she preferred that the case be disposed of by a hearing on the record. I allowed for that possibility, and since no further evidence has been filed by either party, conclude that Respondent has waived its right to an oral hearing.

2. Summary Judgment

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. Veg-Mix, Inc. v. United States Dep’t of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture’s use of summary judgment under the Rules and rejecting Veg-Mix, Inc.’s claim that a hearing was required because it answered the complaint with a denial of the allegations); Federal Rule of Civil Procedure 56(c). An issue is “genuine” if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is “material” if under the substantive law it is essential to the proper disposition of the claim. Alder v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. Schwartz v. Brotherhood of Maintenance Way Employees, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477, U. S. 317, 323-34

(1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Muck v. United States, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. Adler, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. Conaway v. Smith, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 262 (1986).

A review of the record establishes that summary judgment may be entered against Respondent with respect to certain allegations that were not materially disputed, and to the extent discussed infra., below, Complainant's motion is granted.

V. DISCUSSION OF THE UNDISPUTED EVIDENCE

Respondent is a Florida corporation licensed by USDA to exhibit animals pursuant to the Act. CX-1; admissions in Respondent's answer. As authorized by the Act and its implementing regulations, USDA conducted inspections of Respondent's exhibition, which resulted in the issuance of a complaint that was resolved by the entry of a consent decision between USDA and Respondent on February 4, 2009. See, In re Jeffrey Harrod, AWA Docket No. 08-0136. CX-2. The terms of the agreement required Respondent to cease and desist from violating the Act, and further amended Respondent's license to permanently remove 8859 North US 27 NW, Palmdale, Florida as a valid location for engaging in activities covered by the Act. Respondent was permitted to retain its single adult bear housed at 1991 SW 136 Avenue, Davie, Florida, but was

prohibited from acquiring any additional bear for regulated activities. Respondent further agreed to donate, sell or otherwise remove from its care all juvenile and adult big cats that were housed at the location by not later than July 31, 2009. Respondent was ordered to pay a civil penalty in the amount of \$3,750.00. CX-2. APHIS confirmed the terms of the consent decision in an undated letter addressed to Respondent's representative. CX-3.

During the period following the entry of the consent decision, Complainant alleged that Respondent failed to provide access to APHIS officials attempting to inspect Respondent's property on six (6) occasions. CX-4; CX-8; CX-9-10; CX-11; CX-21; CX-22. Complainant also alleged that Respondent failed to make, keep and maintain records of the disposition of animals (CX-5; CX-14) and failed to promptly notify APHIS of an additional site where Respondent housed animals (CX-8 through CX-10).

Although Respondent denied these allegations charged in the complaint at Paragraphs 4, 5 and 6, Respondent provided no evidence or argument in support of its position. In the absence of contrary evidence, I find that these allegations have been established and that Respondent violated the Act and regulations by failing to allow entry to APHIS inspectors; by failing to maintain required records; and by failing to give required notices to APHIS.

VI. DISCUSSION OF DISPUTED FACTS

Complainant alleged that on July 12, 2009, a number of small exotic mammals and domestic pocket pets owned by Respondent died when the air conditioning in the building in which they lived malfunctioned. CX 5; CX-18. In a memorandum written on August 27, 2009, APHIS Inspector Dr. Mary Moore documented that Respondent's employee, "Penny" discussed the problem with an air conditioner failing to automatically re-set itself after a power outage,

resulting in animals dying of excessive heat. CX-7. No animals were housed in that building after the deaths. CX-7.

In the answer filed on December 28, 2011, Respondent explained that “[s]evere storms caused a power outage in the Davie area, which included the Davie property, over which Respondent had no control.” In the response filed on August 22, 2012, Respondent’s representative disagreed that animals were housed in a structure with no windows or insulation. Ms. Hartmann maintained that the structure was fully insulated, had a window with an air conditioner, had seven fans, and had turbines on the roof. Ms. Hartmann maintained that only a seventeen (17) year old blue tongue skink died.

The evidence is uncontroverted that a power outage led to the death of at least one animal. Even accepting the presence of windows, fans and insulation, Respondent made inadequate arrangements for ventilation in the event of a loss of power, which directly led to the death of at least one animal, by Respondent’s admission. Accordingly, I find that Respondent failed to handle animals as carefully as possible in violation of 9 C.F.R. §§ 2.131(b)(1) and (e).

Complainant alleged that Respondent failed to provide adequate veterinary care to a tiger, and failed to maintain a program of veterinary care. In an affidavit signed on May 3, 2010, Dr. Moore stated that she had observed an adult tiger limping during her inspection of Respondent’s facility on February 4, 2010. CX-18. Inspector Moore also stated that Respondent’s program of veterinary care was last signed in 2008, and that Ms. [Hartmann-Harrod] could not recall when her premises were last visited by a veterinarian. Id. The veterinarian did not contact Inspector Moore, as was requested, but Dr. Perez provided an affidavit dated April 22, 2010, in which he confirmed that the limping tiger was arthritic and did not require medication. CX-17. Dr. Perez

stated that he had served as Respondent's veterinarian for several years and had last inspected the premises in February, 2010.

I accord weight to Dr. Perez' statements, made under oath, and find that Respondent did not fail to provide adequate veterinary care to an arthritic tiger. I find no evidence of record to dispute the conclusion that Respondent did not have a current signed plan of veterinary care, and therefore this violation is established.

After an inspection conducted on February 4, 2010, Respondent was charged with failing to meet minimum housing standards because of defects identified in the bear and skunk enclosures. CX-14; CX-18. Respondent did not deny these allegations, but maintained in the answer filed on December 28, 2011, that "[w]hen the deficiencies were pointed out, appropriate steps were taken to remedy all deficiencies immediately".

As Respondent has admitted to the existence of deficiencies, I find that Complainant has established violations of 9 C.F.R. § 3.125(a). The curing of a violation may mitigate the consideration of a penalty, but does not eradicate the fact that the violation occurred. In re: Volpe Vito, Inc., d/b/a Four Bears Water Park and Recreation Area, 56 Agric. Dec. 166 (1997).

V. SANCTIONS

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. In re David M. Zimmerman, 56 Agric. Dec. 433 (1997). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the person's good faith and history of previous violations. In re Lee Roach and Pool Laboratories, 51 Agric. Dec. 252 (1992). Moreover, it has been observed that the AWA is a remedial statute, and the purpose of imposing sanctions is for deterrence, not punishment. In re: David Zimmerman, 57 Agric. Dec. 1038 (1997). The recommendations of administrative officials

responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less or different from that recommended. In re: Marilyn Shepherd, 57 Agric. Dec. 242 (1998). The Secretary may also make an order that such person shall cease and desist from continuing such violation. 7 U.S.C. § 2149 (b).

USDA has recommended that Respondent's AWA license be revoked; that Respondent be assessed civil money penalties; and that Respondent be ordered to cease and desist violating the Act and regulations.

In statements filed on August 22, 2012, Respondent's representative, Barbara Hartmann, objected to the imposition of sanctions, maintaining that Respondent suffered economic loss when USDA refused to allow Respondent to lease or finance the Palmdale property to a third party. See, RX-1; copy of lease. Ms. Hartmann asserted that she believed that the terms of the consent decision would not prevent her from leasing the property. Unfortunately, the consent decision is silent regarding that assertion, but by its terms, Respondent and anyone associated with Respondent, was specifically prohibited from operating a business requiring an AWA license at that site.

Respondent further objected to the civil money penalty of \$34,450.00 recommended by USDA. Ms. Hartmann has argued that an additional civil money penalty is unwarranted in that Respondent paid the penalty associated with the consent decision that Respondent had entered into with USDA. I acknowledge that Respondent paid the penalties associated with the consent order, but Complainant now seeks a penalty of \$13,000.00 for additional violations that are the subject of the instant cause of action. Obviously, the payment of penalties as part of a consent order did not represent sufficient deterrence to prevent additional violations of the Act, and I therefore conclude that the imposition of civil money penalties would be supported.

Respondent suggested that consideration should be given to the fact that maintenance deficiencies identified on inspection were immediately corrected. I accord weight to Respondent's assertions, but note that Respondent had ample familiarity with the regulations and continued to violate them, despite paying a penalty through a consent decision and having its license terminated for a period of two years. While corrections may be taken into account when determining whether a sanction should be imposed, even immediate correction of violations does not eliminate the fact that the violations occurred and does not provide a basis for dismissal of the alleged violations. In re: Volpe Vito, Inc., d/b/a Four Bears Water Park and Recreation Area, supra.

I reject USDA's proposed sanction of \$21,450.00 for Respondent's failure to obey the Secretary's cease and desist Order, as that Order was upheld in a decision by the Judicial Officer, which also affirmed the termination of Respondent's license as the result of its failures. I find the license termination sufficient penalty; however, I agree that a renewed cease and desist Order is appropriate in these circumstances.

Ms. Hartmann also stated that she believed that Respondent's license had "been canceled", and the proposed penalty of revocation of Respondent's license would be a "double action". Respondent's license is currently under a two year suspension, but revocation would result in the permanent disqualification of Respondent from securing a license under the AWA. 9 C.F.R. § 2.11. Accordingly, these are two distinct penalties with very different outcomes, and Respondent's objection is without merit.

A licensee's AWA license may be revoked if the exhibitor has willfully violated any provision of the AWA or its implementing regulations. In re: Big Bear Farm, Inc., Andrew Burr and Carol Burr, 55 Agric. Dec. 107 (1996). The evidence supports that Respondent's actions

were willful, considering Respondent's history of entering into a consent decision, and having its license terminated for a period of two years.

In consideration of all of the evidence, I find it appropriate to revoke Respondent's license. I reject Respondent's contention that Complainant's enforcement of the Act and regulations is "vindictive, vengeful and spiteful". If the violations disclosed by inspections were of a purely technical character, such as the failure to have a current signed veterinary plan, Respondent's arguments might have some persuasive value. However, on six occasions in less than a two year period, no one was at Respondent's facility to allow Inspector Moore access for inspection. Respondent failed to keep required records. Respondent's failure to provide back-up ventilation or otherwise address excessive heat led to animal death, even though storms caused the initial loss of air conditioning. Respondent's failure to abide by the promises it made led to the determination that Respondent was unqualified to be licensed for a period of two years. Respondent's continued willful violations establish that Respondent should not be allowed to hold a license under the AWA.

I further find it appropriate to assess civil money penalties as a deterrent, and hereby impose a penalty of \$10,000.00. However, I acknowledge the significant effect of a permanent revocation of Respondent's license, and therefore, shall suspend the payment of the \$10,000.00 penalty. Respondent shall not be liable to pay the civil penalty so long as neither Respondent, nor its officers, agents, employees, assignees, or successors refrain from conducting business requiring a license under the AWA, or from applying for an AWA license. A period of ninety (90) days from the effective date of this Decision and Order shall be allowed to Respondent to donate, sell or otherwise find appropriate housing for any animals it wishes to dispose of, before

Respondent will be considered to have violated the contingency suspending the civil money penalty described herein.

VI. FINDINGS OF FACT

1. Vanishing Species Inc. is a Florida corporation whose registered agent for service of process is Spiegel & Utrera P.A., 1840 S. W. 22nd Street, 4th floor, Miami, Florida 33145.
2. Vanishing Species Inc.'s current mailing address is 2261 S. W. 83rd Terrace, Davie, Florida 33324.
3. Respondent held a valid license under the AWA, license number 58-C-0660, at all times pertinent to this adjudication.
4. During the period under consideration herein, Respondent operated as an exhibitor as that term is used in the Act and regulations, exhibiting between twelve (12) and seventy-five (75) wild and exotic animals at a facility in Davie, Florida.
5. On February 4, 2009, Respondent executed a consent decision with USDA, which was approved and issued by Chief Administrative Law Judge Peter M. Davenport.
6. Respondent's AWA license was terminated by order of the Secretary of Agriculture, for a period of two (2) years, effective January 8, 2011.
7. On June 2, 2009, October 6, 2009, October 19, 2009, November 5, 2009, March 11, 2010 and July 26, 2010, APHIS inspector Dr. Moore attempted to inspect Respondent's facility, but no one representing Respondent was available to permit inspection.
8. APHIS conducted Inspections of Respondent's facility on August 24, 25, 2009 and February 4, 2010.
9. At the inspections, Respondent failed to produce records documenting the disposition of animals.

10. Respondent housed animals at a site without notifying APHIS of the location.
11. A storm interfered with the air conditioning system that cooled a building that housed animals owned by Respondent, and because the system did not correct itself and Respondent did not provide an alternate cooling system or verify the health of the animals, at least one animal died.
12. Respondent did not have a currently signed program of veterinary care on February 4, 2010.
13. A wooden frame surrounding the water tub in the bear enclosure was in disrepair.
14. The wooden horizontal support beam for the bear enclosure was cracked.
15. The vertical metal support next to the door of the skunk enclosure had exposed jagged edges that were accessible to animals.

VII. CONCLUSIONS OF LAW

1. The Secretary, USDA, has jurisdiction in this matter.
2. Respondent did not timely file a request for a hearing in compliance with 9 C.F.R. §2.11(b) and 7 C.F.R. § 1.141(a), and then orally waived its right to a hearing at a telephone conference with the presiding judge and opposing counsel.
3. Some material facts involved in this matter are not in dispute and the entry of summary judgment in favor of Complainant is appropriate with respect to the following matters:
 - (a) Respondent failed to provide access to APHIS officials attempting to inspect Respondent's property on six (6) occasions in violation of 7 U.S.C. § 2146 (a); 9 C.F.R. § 2.126.
 - (b) Respondent failed to make, keep and maintain records of the disposition of animals in violation of 9 C.F.R. § 2.75(b)(1).

- (c) Respondent failed to promptly notify APHIS of an additional site where Respondent housed animals in violation of 9 C.F.R. §2.8.
4. Respondent failed to handle animals as carefully as possible in willful violation of 9 C.F.R. §§ 2.131(b)(1), (e) when Respondent failed to promptly repair a malfunctioning air conditioner or provide alternate ventilation to a building housing animals, which led to the death of at least one animal.
 5. Respondent failed to maintain a current, signed program of veterinary care in violation of 9 C.F.R. § 2.40 (a).
 6. Respondent failed to maintain minimum standards for its facilities in violation of 9 C.F.R. § 3.125(a) in three instances:
 - (a) The frame around the water tub in the bear enclosure was in disrepair.
 - (b) The wooden horizontal support beam for the bear enclosure was cracked.
 - (c) The vertical metal support next to the door of the skunk enclosure had exposed jagged edges accessible to animals.
 7. Complainant failed to establish that Respondent did not provide adequate veterinary care to a tiger and that allegation is dismissed.
 8. Respondent's violations of the Act and regulations are willful.
 9. In order to promote Respondent's compliance with the Act and regulations, Respondent's AWA license #58-C-0660 hereby is revoked.
 10. Respondent is assessed a civil penalty of \$10,000.00, payment of which is suspended until such time as Respondent or its officers, agents, employees, assignees, or successors conduct business requiring a license under the AWA, or apply for an AWA license.

11. Respondent shall have a period of ninety (90) days after the effective date of this Decision and Order in which to donate, sell or otherwise find housing for animals it wishes to de-acquisition before Respondent would be considered engaging in activity requiring a license under the AWA.
12. An Order instructing Respondents to cease and desist conduct that violates the Act and regulations is appropriate.

ORDER

Respondent shall cease and desist violating the Act and its implementing regulations. Respondent's AWA license No. 58-C-0660 is hereby revoked, commencing on 90 days after the date that this Order becomes final. Respondent shall pay a civil money penalty of \$10,000.00, which amount is suspended so long as Respondent, its officers, agents, employees, assignees, and successors neither engage in conduct subject to the licensing requirements of the AWA, nor apply for an AWA license. Respondent may have ninety (90) days from the date this Decision and Order shall be effective to sell, donate, or otherwise find alternate housing for any animals it wishes to dispose of, without jeopardizing the suspension of the civil money penalty.

This Decision and Order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

So Ordered this 18th day of July, 2013 in Washington, D.C.



Janice K. Bullard
Administrative Law Judge